In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-190

ISADORE H. BELLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A14-A16) is not yet reported. The opinion of the district court (Pet. App. A1-A10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1973, and a petition for rehearing was denied July 20, 1973. The petition for a writ of certiorari was filed on July 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a former partner in a dissolved law partnership was correctly held not entitled to invoke the Fifth Amendment privilege against self-incrimination as a

ground for refusing to produce business records maintained by the partnership while he was a member, where such records had come into his possession after the dissolution.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent portion of the Fifth Amendment is set forth at page 2 of the petition.

STATEMENT

A federal grand jury subpoena directed petitioner, a lawyer, to produce all the books and records of the law partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969 that were then in his possession (Tr. 2, 4-5).[1] Petitioner appeared before the grand jury, but refused to produce any of the documents, relying on his privileges under the First, Fourth, Fifth and Sixth Amendments.[2] He also refused to state whether he had the documents called for by the subpoena, relying on his Fifth Amendment privilege (Tr. 60-61).

The government moved to enforce the subpoena and after an evidentiary hearing the district court ruled that the records were "beyond the pale of the personal privilege" of the Fifth Amendment. However, it limited the subpoena to exclude confidential client files (Pet. App. A1, A7; Tr. 105-106). In its order, the court also directed the petitioner to turn over (Tr. 106) "any cash receipt books, cash disbursement books or

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[1] "Tr." references are to the transcript of proceedings in the district court.

[2] Petitioner confined his argument before the district court and the court of appeals to the Fifth Amendment privilege (Pet. App. A10, A14).

books of records and accounts of the partnership for the years in question." Upon petitioner's refusal to comply, the district court held him in civil contempt. (Pet. App. A11). The Third Circuit affirmed. (Pet. App. A14-A16).

At the district court hearing, the evidence showed that in 1968 and 1969 petitioner was a partner in Bellis, Kolsby & Wolf, a three-man law firm with five or six employees (Tr. 67). Petitioner's secretary, Mrs. Harriet Lipman, also served as the firm's bookkeeper, and, as such, she made the entries for receipts and disbursements, wrote checks and performed other bookkeeping duties under the supervision of the firm's outside accountant (Tr. 67-68). Mrs. Lipman testified that, in addition to herself, the three partners in the firm as well as the outside accountant and his staff, had access to the books of the firm (Tr. 77).

The personal expenses of the partners were sometimes reflected on the books of the firm. From time to time Mrs. Lipman was instructed to pay country club bills or restaurant charges with partnership checks (Tr. 79-80). The bills were usually broken down into business and personal expenses, and any personal expenses would be charged to the drawing account of the partner involved (Tr. 79-80). The firm's outside accountant was also given access to these records in order to enable him to prepare the partnership tax returns (Tr. 81).

In late 1969 or early 1970 the partnership was dissolved and petitioner and Mrs. Lipman left the premises (Tr. 69, 81-82). Petitioner thereupon joined another law firm (Tr. 66, 69). The records of the Bellis, Kolsby & Wolf partnership were left in petitioner's old office, where Mrs. Lipman had kept them while he was a member of that firm (Tr. 69-70). From time to time

Mrs. Lipman went at petitioner's request to this office to get information from the records or to bring back files which the petitioner needed (Tr. 70-71, 82-83).

In late February or early March 1973, petitioner or his attorney instructed her to bring to his office the records at issue in this proceeding (Tr. 71, 84-85). At this time she went over to the office where these records were stored, spoke to the secretary of one of petitioner's former partners, and "took what [she] could carry." (Tr. 71.) Over the next week or so she made four or five trips to complete the removal of the records (Tr. 85). The records which she removed at this time included the firm's cash receipts journals and probably the accounts receivable ledgers for 1968 and 1969 (Tr. 85-87).

ARGUMENT

1. In concluding that petitioner could not invoke the Fifth Amendment privilege against self-incrimination to refuse to produce business records maintained by his former law firm during the period when he was a member, the court of appeals correctly applied the principles announced in *United States* v. *White*, 322 U.S. 694. There, this Court held that "[s]ince the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization * * *" (322 U.S. at 699). The Court accordingly ruled that an officer of an unincorporated labor union could not refuse to produce the official records and documents of the union which were in his possession on the ground that they might tend to incriminate the union or himself as an officer and individually. Distinguishing between the personal records of an individual and those which he holds on behalf of an organization, the Court stated that (322 U.S. at 699-700):

> * * * [s]uch records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. [Citation omitted.] They therefore embody no element of personal privacy and carry with them no claim of personal privilege.

The records sought in this case are official records and documents of the Bellis, Kolsby & Wolf partnership rather than personal documents belonging to petitioner Bellis. The cash receipts and cash disbursements journals of the firm are typical of the category of documents whose production was requested. These journals were kept by one of the firm's employees who served as bookkeeper, they reflected transactions in which each of the partners had a direct interest to the extent of his share of the profits and losses of the firm, and they were used by the firm's outside accountant to prepare its partnership tax returns. (Tr. 67, 81.) Under these circumstances, they were partnership records and not petitioner's private and personal papers; nor were they in his possession in a purely personal capacity.[3] *United States* v. *Onassis*, 133 F. Supp. 327, 331-332 (S.D.N.Y.); cf. *Boyd* v. *United States*, 116 U.S. 616 (1886). See also *Couch* v. *United States*, 409 U.S. 322, 330 n. 10, 335.

In formulating a rule for the applicability of the Fifth Amendment privilege to the records of unin-

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[3] The fact that the partnership was dissolved before the subpoena was served did not alter the character of the records as partnership records. Similarly, the fact that petitioner's former partners were willing to make the records in question available to him did not make them any the less partnership records.

corporated associations, the court in *White* stated that the test is (322 U.S. at 701):

> * * * whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

Petitioner urges (Pet. 7) that under this test the records of a small three-man partnership are protected by the privilege. The Court's formulation, however, cannot be reduced to a simple proposition based upon the size of the organization. By distinguishing between an organization which embodies the "purely private or personal interests" of its members and those which embody only "common or group interests," it appears that the Court meant to protect organizations such as family units, where personal interests predominate. Where, as here, three individuals hold themselves out for the purpose of practicing a profession and sharing profits therefrom, the partnership records would reflect only their "common or group interests" under the standards of the *White* case.

2. The decision below is entirely consistent with this Court's interpretations of *United States* v. *White, supra.* On two occasions since *White,* this Court has held that the records of an unincorporated association were not privileged under the Fifth Amendment without discussion of the size of the organization, its degree of impersonality, or the scope of its activities.

McPhaul v. *United States*, 364 U.S. 372, 380; *Curcio* v. *United States*, 354 U.S. 118. In *McPhaul* the court stated that (p. 380) "it is well settled" that the privilege could not be invoked by an officer of the Civil Rights Congress with respect to records of that organization held by him in a representative capacity. Contrary to petitioner's assertion (Pet. 4-5), these decisions did not rest upon the "size" and "impersonality" of the organization but upon the fact that the organization's records were not the personal property of the individual claiming the privilege. That same reasoning applies in the present case and it is immaterial that the organization here is only a three-man partnership.[4]

Similarly, in *In re Mal Brothers Contracting Co.*, 444 F. 2d 615 (C.A. 3), certiorari denied, 404 U.S. 857, the court rejected a claim of privilege invoked by a partnership which opposed a federal grand jury subpoena to produce certain of its records, primarily accounting records, relating to a joint venture in which the partnership had participated. After reviewing the authorities, the court pointed out that (p. 619)—

> * * * it is essentially clear that the defendants here had all the aspects of a corporate enterprise and

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[4] *See In re Grand Jury Subpoena Duces Tecum*, Civil No. 72-292-B (D. Md., Apr. 23, 1973), where the district court was faced with a claim almost precisely identical to petitioner's contention in the present case. There the court rejected the claim that "a law firm having four partners is a small personal organization merely because it has only four members" (Op. 11) and refused to permit a partner in the firm to claim his Fifth Amendment privilege with respect to production of records of the firm. The court concluded that the privilege of a member of an unincorporated association could only be raised where the identity of the association and the member were coincident.

that there was nothing personal or private in connection with the papers solicited from them under the subpoena herein.

Moreover, in *United States* v. *Wernes*, 157 F. 2d 797, the Seventh Circuit relied upon the fact that the records of an unincorporated oil drilling venture were not the "private property" of the defendant, "or at least in his possession in a purely personal capacity" (*id.*, p. 800), in refusing to apply the Fifth Amendment privilege to such records. In *United States* v. *Silverstein*, 314 F. 2d 789, certiorari denied, 374 U.S. 807, the Second Circuit upheld an order enforcing an Internal Revenue summons directed against one of three general partners, all of whom were members of the same family, who directed a real estate and rental management business. Although the court noted that the considerable size of the enterprises and the interests of numerous limited partners in each of the ventures made it analogous to a group of corporations the records of which are not privileged, it nevertheless drew the *White* distinction between purely private or personal records and representative possession of records of "corporations, limited partnerships or other entities * * *." (314 F. 2d at 791).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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